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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1940

Number 785

WENZEL & HENOCH CONSTRUCTION COMPANY, a corporation,

Petitioner,

vs

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a municipal corporation,

Respondent.

Brief in Reply to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

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To The Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

Your Petitioner, Wenzel & Henoch Construction Company, in reply to the Respondent's brief in opposition to the petition for certiorari, respectfully shows to the Court as follows:

The Respondent virtually admits that the State Courts in California recognize impracticability of contract performance due to excessive difficulty and expense as the equivalent of legal impossibility (Resp. Br. 15). The Respondent does not deny that in disposing of the case at bar the lower Courts failed to apply and arrived at a result inconsistent with the local law of California. In opposing the Petitioner's prayer, however, the Respondent relies upon two contentions: (1) That the Petitioner's argument based on impracticability of performance cannot be urged in this Court because it was not developed in the lower Courts, and (2) That the Petitioner narrowed the scope of its prayer for *quantum meruit* recovery in a stipulation set forth on page 7 of the Respondent's brief.

In regard to the Respondent's contention that the impracticability argument cannot be considered by this Court because it was not properly developed in the lower Courts, the Petitioner respectfully wishes to direct the attention of this Court to the fact that the principal reason why the Petitioner did not more fully develop the impracticability argument in the Courts below was that the Petitioner was repeatedly prevented from doing so by the Trial Court's rulings in connection with the pleadings and the evidence. The Trial Court granted the Respondent's motions to strike the portion of the Petitioner's complaint referring to and partially setting forth the printed report of the District's Geologist and alleging that the Company relied thereon in making its bid (R. 51-52). During the trial the Court refused to allow this report to be put in as evidence (Pl. Ex. 16; R. 765), and it also excluded all testimony tending to prove that both parties relied upon this report and other information supplied by the District in making the contract (R. 1284-90). Later the Trial Court again refused to allow certain amendments to the Petitioner's complaint incorporating such matters (R. 1296-1300). Petitioner was continually prevented from making allegations

and putting in evidence which would enable it properly to develop the argument based on impracticability of performance. The very rulings which the Petitioner assigns as prejudicial errors wherein the Trial Court failed to apply and reach a result consistent with the local law of California, are the rulings which forced the petitioner to rely primarily upon other theories of recovery and prevented the proper development of the impracticability argument in the Courts below.

In regard to the Respondent's argument that this Court is precluded from considering the impracticability argument because of the stipulation set out on page 7 of Respondent's brief, the Petitioner respectfully wishes to direct the attention of the Court to the fact that the stipulation was made for a very limited purpose,—"In order to enable the Court to pass upon the defenses pleaded in the defendant's fourth answer to each count, or cause of action, of plaintiff's first amended complaint without the introduction of all plaintiff's evidence in chief, * * *" (R. 383). The defendant's fourth answer to the various counts is restricted in scope (R. 310-14), and the stipulation was made for the sole purpose of facilitating the Trial Court's ruling upon these defenses. It is quite apparent that by this stipulation neither of the parties intended irrevocably to narrow the issues of the case, waiving all previous objections and every other legal theory of recovery. This Court has repeatedly expressed its unwillingness to be bound by stipulations relating to matters of law.

Swift & Co. vs. Hocking Valley Ry. Co., 243 U. S. 281 (1917);

Sanford's Estate vs. Comm., 308 U. S. 39, 51 (1939);

Case vs. Los Angeles Lumber Products Co., 308 U. S. 106, 114 (1939);

cf. *Andrews vs. St. Louis Joint Stock Land Bank*, 107 F. (2d) 462, 470 (C. C. A. 8th, 1939).

And this Court has also shown its willingness to relieve parties from the injustice of stipulations which, given inadvertently, may develop into pitfalls.

Carnegie Steel Co. vs. Cambria Iron Co., 185 U. S. 403, 444 (1902).

See also:

Aronstam vs. All-Russian Central Union, 270 Fed. 460, 464 (C. C. A. (2d) 1920);

Federal Export Corp. vs. U. S., 25 F. Supp. 109 (Ct. Cl. 1939).

Respectfully submitted,

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